U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 19 September 2003

Case No.: 2003-LHC-375

OWCP NO.: 06-159114

In the Matter of:

CHARLES A. WILLIAMS,
Claimant

v.

INGALLS SHIPBUILDING, INC.,
Employer

APPEARANCES:

D. A. BASS-FRAZIER, ESQ.,
On Behalf of the Claimant

PAUL B. HOWELL, ESQ.,
On Behalf of the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act" or "LHWCA"). The claim is brought by Charles Williams, Claimant, against his former employer, Ingalls Shipbuilding, Inc. ("Ingalls"), Respondent. Claimant asserts he has an employment-related back condition for which Ingalls is responsible. A hearing was held on June 11, 2003, in Mobile, Alabama, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence.[1]:

[1] The following abbreviations will be used in citations to the record: JX- Joint Exhibit; CX- Claimant's Exhibit, RX- Respondent's Exhibit, and TR - Transcript

1) Joint Exhibit No. 1;

2) Claimant's Exhibits Nos. 1-7; and

3) Respondent's Exhibits Nos. 1-28.

This decision is being rendered after giving full consideration to the entire record.

STIPULATIONS[2]

The Court finds sufficient evidence to support the following stipulations:

1) This case is governed by the LHWCA.

2) On April 15, 1994, Claimant sustained an injury within the course and scope of his employment with Ingalls.

3) At the time of the injury, Claimant was engaged in constructing Naval vessels alongside the navigable waters of the Gulf of Mexico at Ingalls Shipbuilding, Inc., in Pascagoula, Mississippi.

4) Ingalls was advised of Claimant's injury on April 15, 1994.

5) A Notice of Controversion was filed on April 29, 1994.

6) An Informal Conference was held on April 15, 2002.

7) Claimant's average weekly wage at the time of his injury was $524.68.

8) Ingalls paid to Claimant temporary total disability benefits at a rate of $349.79 for the following periods: from April 18, 1994 until April 20, 1994, from April 22, 1994 until April 24, 1994, from May 19, 1994 until July 10, 1994, from February 15, 1995 to April 5, 1995, from November 15, 1996 until December 2, 1996, from March 3, 1997 until April 30, 1997, and from October 6, 1999 until November 10, 2000.

9) Ingalls paid permanent partial disability benefits to Claimant from November 11, 2000 until August 16, 2002, at a rate of $211.57.

10) Ingalls has been paying permanent partial disability benefits to Claimant at a rate of $178.68 since August 17, 2002.

[2] JX-1

11) Claimant's medical benefits have been paid.

12) Claimant reached maximum medical improvement in this case on September 12, 2000.

ISSUES

The unresolved issues in these proceedings are:

1) Nature and Extent of Disability;

(2) Section 8(f) Relief; and

(3) Attorney's Fees.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Charles A. Williams

Mr. Williams was born in August 1954. TR. 14. He graduated high school in 1972 with average grades and thereafter joined the United States Army. TR. 14, 51-52. For his first ten years in the Army, Mr. Williams served as a Telecommunication Center Specialist, performing work that involved the reception of encrypted messages. TR. 52. Mr. Williams was then re-trained in Strategic Microwave Systems Repair, and Mr. Williams served as an Electronic Technician for his last ten years in the Army. TR. 52. Mr. Williams retired from the Army and was honorably discharged in August 1992. TR. 14.

In 1980, Mr. Williams suffered an injury to his back due to a car accident. TR. 15, 53-54. As a result, Mr. Williams suffered periodic back spasms and continued to receive intermittent medical treatment for his back up until the time of his work injury at Ingalls in 1994. TR. 16, 56-59. According to Mr. Williams, his back problem was not significant prior to his Ingalls injury. TR. 59. Mr. Williams testified that upon his retirement from the Army in 1992, the Army assigned him a 10% disability rating in his back. TR. 30, 60. The Army also assigned Mr. Williams a 10% disability rating in each of his knees. TR. 30.

Mr. Williams testified that his first job after leaving the Army entailed working with a crew in the removal of railroad tracks. TR. 19. Mr. Williams testified that the work involved pulling spikes and intense physical labor. TR. 19. Mr. Williams worked

at that job from September or October 1992 until January 1993. TR. 19. Mr. Williams testified that he did not have any problems with his back while working on the railroad tracks. TR. 20.

Mr. Williams began working at Ingalls in November 1993 as an electrician/tac welder. TR. 20. Mr. Williams testified that his work involved the installation of electronic components in ships. TR. 20. Mr. Williams testified that on April 15, 1994, the ground was wet and he slipped and fell in an awkward position. TR. 20-21. Mr. Williams testified that he felt an excruciating pain in his low back. TR. 21.

Following his fall, Mr. Williams sought treatment with Dr. Roger Setzler. Mr. Williams testified that Dr. Setzler performed a percutaneous discectomy on Mr. Williams' back in January or February 1995. TR. 23, 61. After the procedure, Dr. Setzler returned Mr. Williams to work on light duty. TR. 23-24, 61. Mr. Williams eventually progressed to regular duty status. TR. 23-24, 61. Mr. Williams testified that after returning to regular duty, he had problems at work, including difficulty with getting around the ship and working in small spaces. TR. 24, 61. Mr. Williams testified that his back bothered him to the point that he decided he needed to change work environments. TR. 24, 61.

Mr. Williams left Ingalls in May 1995, after he was hired by Alta Telecom ("Alta"). TR. 25; RX-27, pp. 27, 50-52. With Alta, Mr. Williams worked installing cellular microwave equipment. TR. 26. Although he earned a lesser wage, Mr. Williams' earnings with Alta were greater than his earnings with Ingalls due to working more hours and working overtime. TR. 25. Mr. Williams continued to see Dr. Setzler occasionally while working for Alta. TR. 28, 65-66. Mr. Williams testified that although his work at Alta involved much less physical stress than his work at Ingalls, his Ingalls-related back problems persisted. TR. 27, 65-66. Mr. Williams testified that he was taken off of work from Alta by Dr. Setzler in November-December 1996 and March-April 1997, due to flare-ups in his back condition. TR. 28, 65-66. Mr. Williams worked for Alta until December 28, 1998, at which time he resigned. TR. 28, 67. Mr. Williams testified that he resigned because of a child custody dispute involving his son and because of escalating problems with his back and leg. TR. 28, 67. Mr. Williams testified that his resignation was not based on a medical opinion and that he did not have any medical limitations when he left Alta. TR. 68-69.

Mr. Williams testified that he contacted the Veterans Administration ("VA") in 1999 about receiving work rehabilitation services. TR. 28. Mr. Williams explained that he was continuing to have problems and that Dr. Setzler suggested he find another line of work. TR. 28. Mr. Williams testified that he had been told previously by the VA that he could receive rehabilitation training because he was a disabled veteran. TR. 29.

Mr. Williams testified that the VA agreed to provide him with rehabilitation training compatible with his physical limitations. TR. 30. Under the VA's sponsorship, Mr. Williams was enrolled in Bishop State Community College. TR. 31. Mr. Williams studied Electronic Engineering Technology, with an emphasis on computer repair. TR. 31. Mr. Williams testified that the electronic engineering program was selected for him by Jerry Shirey, a counselor with the VA. TR. 31; RX-28, p. 47. According to Mr. Williams, that program was selected because the work was more mental and the physical requirements were limited. TR. 31.

Mr. Williams testified that neither Ingalls nor the United States Department of Labor ("DOL") was involved in his enrollment at Bishop State. TR. 72-73. Mr. Williams testified that attending Bishop State was his own decision after he was told by his doctor that he needed a career change. TR. 72. According to Mr. Williams however, the DOL implicitly endorsed his enrollment at Bishop State by providing vocational support services through Sue Berthaume, a vocational rehabilitation counselor working for the DOL. TR. 35; RX-28, pp. 49-50.

Mr. Williams began at Bishop State on August 21, 1999, but had to withdraw in October or November 1999 because of problems with his right leg. TR. 31-32. Mr. Williams testified that in October 1999, he saw Dr. Setzler regarding his right leg problems and Dr. Setzler referred him to Dr. Bendt Peterson. TR. 31, 69. Dr. Peterson cared for Mr. Williams' right leg, and Dr. Peterson also ultimately performed back surgery on Mr. Williams on March 2, 2000. TR. 32-33, 69; RX-21, pp. 9-10; RX-22, p. 14.

In August 2000, following the back surgery, Mr. Williams returned to Bishop State. TR. 33. Mr. Williams explained that he decided to return to school after Dr. Peterson had told him he could not go back to his previous work. TR. 71. Mr. Williams testified that the VA required him to attend school full-time in order to receive sponsorship from the VA. TR. 34. Mr. Williams testified that he was required to take at least 12 credit hours during the fall and spring semesters and nine credit hours during the summer semester. TR. 34. Mr. Williams was also required to maintain a grade point average of 2.5. TR. 34, 73. Mr. Williams testified that his grade point average upon graduation was 2.892. TR. 34.

Mr. Williams testified that he had difficulty in the college environment, as he had to once again set his mind to learning after being away from school for so long. TR. 34, 104. According to Mr. Williams, he stayed up on average until 2 to 3 a.m. trying to complete his homework. TR. 79. Mr. Williams testified that he had to get a tutor for math and that he had to drop some classes because they were too difficult. TR. 34-35, 73-75. Mr. Williams testified that the dropped classes did not violate the VA's semester hour requirements because he was excused by the VA, based on the VA's inability to secure a tutor for him. TR. 73-75. Mr. Williams testified that, in order to complete his

degree expeditiously and to move on with his life and become productive, he went to school during the summer and took on heavy class loads during some terms. TR. 104-05.

In November 2000, a few months after Mr. Williams' re-enrollment at Bishop State, Mr. Williams met with Tommy Sanders, a vocational rehabilitation specialist hired by Ingalls. TR. 39, 78. Mr. Williams testified that he received job leads from Mr. Sanders and that he applied within 2 or 3 days for the openings identified. TR. 39, 78, 81. Mr. Williams testified that he contacted Best Western, Holiday Inn Express, and Hampton Inn about a desk clerk trainee position and a maintenance position. TR. 39-40. Mr. Williams also applied for an electronic technician position with Hurricane Electronics, a gate guard position with Nyco Security, a shuttle bus driver position with Mobile Bay Transportation. TR. 40-41. Mr. Williams testified that he received an offer from Nyco Security in November 2000, but that he was unable to accept the offer because of his school schedule. TR. 40, 79. Mr. Williams testified also that he could not maintain a part-time or night job at that time because he was occupied with homework. TR. 79, 104.

Mr. Williams graduated from Bishop State with an Associates Degree on May 5, 2002. TR. 35. Mr. Williams testified that he did not work while in school because he was not able to handle both a full course load and a job. TR. 78, 83. Following his graduation, Mr. Williams testified that he was eager to return to work and the mainstream of life. TR. 35. He testified that he used vocational assistance from the VA and DOL, searched online for employment, visited prospective employers, checked leads from labor market surveys, checked newspapers and job listing services, and visited State of Alabama employment offices. TR. 35-36, 43. Mr. Williams testified that the VA assisted him in formulating his resume, preparing for interviews, and acquiring job search literature. TR. 36-37.

Mr. Williams did not limit his job search to electronic engineering jobs. TR. 36. Mr. Williams testified that he applied for desk clerk positions with Fairfield Inn and Courtyard Marriott, a sales associate position with Calagaz One-Hour Photo, a night auditor position with Holiday Inn Express, and a telemarketer position with West Teleservices. TR. 40-42. Mr. Williams testified that he scored well on a placement exam with the Mobile County Personnel Board, but that referrals from that office to openings in the Mobile Municipal Information Systems department and the City of Mobile Police Department were not fruitful. TR. 37-38, 95. Mr. Williams also pursued an airport security personnel position with the Transportation Security Administration, a computer repair position with Sears, bio-med equipment repair positions with Springhill Memorial Hospital and Mobile Infirmary Health System, an electronic technician position with ITC Deltacom, a communications-related position with Digidyne, Inc., and a computer repair position with the University of South Alabama. TR. 39-45. Mr. Williams testified that he also contacted BellSouth, Comcast Cable Vision, Arnold's

Instruments, Z Technology, Bagby & Russell Electric Company, the Army Civilian Personnel Office, USA Jobs, Alltel, Cingular Wireless, and UPS. TR. 38, 45-49.

Mr. Williams has not been able to secure employment. TR. 106. Mr. Williams conceded that his two and a half years at school has not benefited him. TR. 84, 86-87. According to Mr. Williams, the field of electronic technology had become saturated while he was in school and jobs were being lost everywhere. TR. 85-86. Mr. Williams testified that since his graduation, he has searched for jobs three times a week on average. TR. 36. Mr. Williams explained that he does not search for work every day because some days he wakes up in pain and does not feel well physically. TR. 36, 85-86.

II. MEDICAL EVIDENCE:

1. Testimony and Reports

Bendt Peterson, M.D.

Dr. Peterson is a board certified orthopedic surgeon with a specialty in the spine. RX-22, p. 6. Based on a referral from Dr. Setzler, Dr. Peterson first examined Mr. Williams on October 20, 1999, for back and lower extremity pain. RX-21, p. 1; RX-22, p. 11. Dr. Peterson diagnosed Mr. Williams with neuroforaminal stenosis, discogenic low back pain, MTP arthrosis, and posterior tendonitis. RX-21, p. 1; RX-22, p. 12. On March 2, 2000, Dr. Peterson performed a surgical fusion on Mr. Williams' back that proceeded without complication. RX-21, pp. 9-10; RX-22, p. 14. Mr. Williams progressed after the surgery, and Dr. Peterson indicated on July 12, 2000, that work as an electrician would probably be a bit too onerous for Mr. Williams' back. RX-21, pp. 28, 30. Dr. Peterson indicated that job retraining through academics was in order. RX-21, p. 28. On August 2, 2000, Dr. Peterson recommended work in other fields that did not involve significant bending, twisting, and lifting with the back. RX-21, p. 30.

On September 12, 2000, Dr. Peterson indicated that Mr. Williams had reached maximum medical improvement. RX-21, p. 31; RX-22, p. 16. Dr. Peterson assigned permanent restrictions for Mr. Williams of no lifting of greater than 30 pounds, no bending, twisting, climbing, or crawling, and five minute breaks after 30 minutes of standing and/or sitting. RX-21, p. 31-33; RX-22, pp. 17-18. Dr. Peterson opined that Mr. Williams had a 13% impairment as a result of his spinal condition. RX-21, p. 31-33; RX-22, pp. 16-17. Mr. Williams continued to be treated by Dr. Peterson for intermittent back pain. RX-21, pp. 33-41: RX-22, p. 19. Although Dr. Peterson did not think Mr. Williams would need further surgery, he indicated that Mr. Williams might need pharmacologic support and occasional therapy. RX-22, pp. 27-28. After reviewing Mr. Williams' medical records from Dr. Setzler and the Army, Dr. Peterson opined that Mr. Williams had a pre-existing back problem that combined with and contributed to the effects of his April 1994 work injury at Ingalls to make Mr. Williams materially and

substantially more disabled than he would have been if he did not have the pre-existing conditions. RX-22, pp. 22-24.

2. Reports

United States Army Medical Records

Medical records from DeWitt Army Hospital, Walter Reed Army Medical Center, and USA Health Clinic indicate that Mr. Williams reported pain to his neck and lumbar area following a motor vehicle accident on February 29, 1980. RX-18. According to the records, Mr. Williams suffered a low back/lumbar strain which persisted throughout the 1980s. RX-18, pp. 3-16.

Ingalls Medical Records

According to Ingalls' medical records, Mr. Williams slipped and fell on April 15, 1994, causing pain in his lower back and side. RX-19, p. 2.

Roger M. Setzler, M.D.

According to Dr. Setzler's records, Mr. Williams injured his back after slipping and falling at Ingalls on April 15, 1994. RX-20, p. 1. Dr. Setzler opined that Mr. Williams had a ruptured disc and probably strained his back. RX-20, p. 4. On February 15, 1995, a percutaneous discectomy surgery was performed on Mr. Williams' back. RX-20, pp. 13-14. On May 17, 1995, Dr. Setzler indicated that it appeared Mr. Williams' pre-existing lumbar condition was aggravated by the Ingalls accident. RX-20, pp. 22, 24. Dr. Setzler continued to treat Mr. Williams periodically until October 6, 1999, at which time he referred Mr. Williams to Dr. Peterson. RX-20.

Azalea City Hand & Rehab

On June 14, 2000, Mr. Williams underwent an functional capacity evaluation at Azalea City Hand and Rehab. RX-21, pp. 15-27. The report indicates that, based on DOL standards, Mr. Williams demonstrated lifting in the medium classification of work. RX-21, p. 15, 25. Mr. Williams also demonstrated positional tolerance for kneeling and repetitive squatting on an occasional basis. RX-21, pp. 15, 25. Mr. Williams had tolerance on a frequent basis for sitting, standing, walking, stair climbing, elevated work, forward bending, and rotation. RX-21, pp. 15, 25. According to the report, Mr. Williams demonstrated deficits in kneeling, ladder climbing, and repetitive squatting, and Mr. Williams was unable to perform crawling and static crouching exercises. RX-21, pp. 15, 25.

III. VOCATIONAL EVIDENCE: Reports

Tommy Sanders

On November 7, 2000, Mr. Sanders interviewed Mr. Williams for a vocational assessment. RX-25, p. 1. Mr. Sanders reviewed Mr. Williams' educational background, military and employment history, and medical history, including military records and the records of Drs. Setzler and Peterson. RX-25, pp. 1-3. Mr. Sanders identified four employers that he believed constituted suitable alternate employment for Mr. Williams. Mr. Sanders identified (1) a desk clerk trainee position at Best Western, with entry wages of $5.25 per hour; (2) four full and part time gate guard positions at Nyco Security, with wages of $5.75 per hour; (3) a fuel booth cashier position at Maxx Oil, paying $5.60 per hour; and (4) a position with Hurricane Electronics for which no wage was identified. RX-25, pp. 3-4.

In an August 8, 2002 report, Mr. Sanders identified three other positions that suited Mr. Williams. RX-25, pp. 5-6. Mr. Sanders identified (1) a desk clerk position at Fairfield Inn for $6.50 per hour; (2) a desk clerk position with Courtyard Marriott for $6.50 per hour; and (3) a sales associate position with Calagaz One Hour Photo, paying $6.25 per hour plus commission. RX-25, pp. 5-6. In an April 22, 2003 report, Mr. Sanders identified three additional employment opportunities for Mr. Williams: (1) a night auditor trainee position at Holiday Inn Express, paying $6.00 per hour; (2) a night auditor trainee position at Hampton Inn, paying $6.25 per hour; and (3) telemarketing representative positions at West Teleservices with wages of $7.00 per hour or commission, whichever sum is greater. RX-25, p. 8.

Sue N. Berthaume

Ms. Berthaume was referred by the United States Department of Labor for rehabilitation services for Mr. Williams. RX-26. Ms. Berthaume conducted an initial vocational interview of Mr. Williams on March 28, 2001. RX-26, p. 1. In her report, Ms. Berthaume summarized Mr. Williams' medical, educational, military, and vocational histories. RX-26, pp. 2-3. Ms. Berthaume indicated that Mr. Williams reported being sponsored by the VA to attend Bishop State Community College for a degree in Electronic Engineering Technology. RX-26, p. 2.

Ms. Berthaume performed job rehabilitation support services while Mr. Williams attended Bishop State, and Ms. Berthaume performed placement services on behalf of Mr. Williams upon his graduation. CX-2; RX-26. In her August 1, 2001 report, Ms. Berthaume indicated that Mr. Williams would be able to earn entry-level wages of approximately $8.00 to $9.00 per hour after he completed his degree at Bishop State. CX-2, p. 10. Although Mr. Williams had not found a job by February 2003, Ms. Berthaume indicated that his continued feasibility for success was good. CX-2, p. 26; RX-26, p. 16.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. § 919(d) and 5 U.S.C. § 554, by way of 20 C.F.R §§ 702.331 and 702.332. See Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed. 2d 225.

The situs test originates from § 3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from § 2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." Id. To be eligible for

compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, the parties do no contest jurisdiction under the Act. JX-1. At the time of his back injury, Mr. Williams worked for Ingalls as an electrician/tac welder, installing electronic components in ships. TR. 20. In addition, Mr. Williams' back injury occurred when Mr. Williams slipped at the Ingalls shipyard. TR. 20-21; RX-2. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a prima facie case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his prima facie case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990).

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

In this case, the parties have stipulated that Mr. Williams suffered an injury to his back within the course and scope of his employment with Ingalls. JX-1. This stipulation is supported by the record and is accepted by the Court. Mr. Williams testified that on April 15, 1994, he hurt his back when he slipped and fell while working at Ingalls. TR. 20-21. Mr. Williams' work injury is also documented in an accident report by Ingalls. RX-2. Dr. Roger Setzler treated Mr. Williams after his fall, and Dr. Setzler opined that Mr. Williams had a ruptured disc and probably strained his back due to his work-injury. RX-20, pp. 4, 22. In addition, in October 1999, Dr. Bendt Peterson diagnosed Mr. Williams with neuroforaminal stenosis, discogenic low back pain, MTP arthrosis, and

posterior tendonitis. RX-21, p. 1; RX-22, p. 12. Based on the foregoing, the Court finds that Mr. Williams suffered an injury to his back on April 15, 1994, and that the injury was related to his employment with Ingalls.

NATURE/EXTENT OF DISABILITY AND MAXIMUM MEDICAL IMPROVEMENT

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, the parties have stipulated that Mr. Williams reached maximum medical improvement on September 12, 2000. JX-1. This stipulation is supported by the opinion of Dr. Peterson. RX-21, p. 31; RX-22, p. 16. Therefore, the Court finds that Mr. Williams' disability became permanent on September 12, 2000.

The extent of disability can be either partial or total. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

A claimant is entitled to total disability benefits if suitable alternative employment is reasonably unavailable due to the claimant's participation in a vocational rehabilitation program sponsored by a state or federal entity. See Louisiana Ins. Guar. Ass'n v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP [Brickhouse], 315 F.3d 286, 36 BRBS 85 (CRT) (4th Cir. 2002); Brown v. National Steel and Shipbuilding Co., 34 BRBS 195, 198 (2001). Entitlement to disability benefits based on enrollment in a rehabilitation program is not automatic, but instead depends on an analysis of various factors relevant to ascertaining whether employment is reasonably available. Castro v. General Constr. Co., 37 BRBS 65, 69 (2003). In deciding the issue, the following factors are relevant: (1) whether enrollment in a rehabilitation program precluded any employment, (2) whether an employer agreed to a rehabilitation program and continued payment of benefits, (3) whether completion of such a program would benefit a claimant by increasing his wage-earning capacity, and (4) whether a claimant demonstrated diligence in completing such a program. Brickhouse, 315 F.3d at 293, 36 BRBS at 89-90 (CRT); Castro, 37 BRBS at 70 (2003). These factors were developed from the facts supporting the award in Abbott and do not constitute a complete or inflexible standard. Brickhouse, 315 F.3d at 295. Furthermore, evidence of an eventual increase in the claimant's wage-earning capacity is not mandatory for an award under Abbott. Castro, 37 BRBS at 68, 72; Brickhouse, 315 F.3d at 295-296, 36 BRBS at 91 (CRT).

In this case, the Court finds first that Mr. Williams cannot return to his work at Ingalls due to his employment-related back condition. In July and August 2000, Dr. Peterson opined that Mr. Williams' back condition precluded him from working as an electrician, due to the significant bending and twisting involved in that line of work. RX-21, pp. 28, 30. Dr. Peterson recommended that Mr. Williams undergo job retraining through academics. RX-21, p. 28. On September 12, 2000, Dr. Peterson assigned permanent restrictions for Mr. Williams of no lifting of greater than 30 pounds, no bending, twisting, climbing, or crawling, and five minute breaks after 30 minutes of standing and/or sitting. RX-21, p. 31-33; RX-22, p. 17-18. The Court finds that these restrictions prohibit Mr. Williams from returning to his regular duties as an electrician/tac welder with Ingalls. Therefore, based on Dr. Peterson's medical opinion and work restrictions for Mr. Williams, the Court finds that Mr. Williams has established a prima facie case of total disability.

Next, the Court finds that Mr. Williams' case falls within the scope of Abbott and its progeny. First, the Court finds that the Abbott rule applies to Mr. Williams' vocational rehabilitation program at Bishop State. Mr. Williams' enrollment at Bishop State was sponsored by the VA, and the VA maintained oversight over Mr. Williams' attendance and performance. TR. 31, 34, 73-75. Dr. Peterson indicated that Mr. Williams' enrollment at Bishop State was reasonable and that job retraining through academics was in order for Mr. Williams, due to his back condition. RX-21, p. 28. The DOL also effectively endorsed Mr. Williams' vocational rehabilitation at Bishop State. TR. 35; CX-2; RX-28, pp. 49-50. Through Sue Berthaume, the DOL became aware that Mr. Williams was sponsored by the VA for rehabilitation training at Bishop State. CX-2, pp. 2-4. The DOL agreed to provide supportive counseling and services to Mr. Williams while he attended Bishop State. CX-2. Based on the foregoing, the Court finds that Mr. Williams' program at Bishop State is consistent with rehabilitation programs acceptable under the Abbott rule, as Mr. Williams' program at Bishop State was a federally-sponsored definitive course of rehabilitation, with approval from the DOL. See Brown, 34 BRBS at 198.

Mr. Williams' enrollment in an acceptable rehabilitation program does not automatically entitle him to disability benefits. See Castro, 37 BRBS at 69. Instead, several factors are relevant in deciding the issue. See id.; see also Brickhouse, 315 F.3d at 293, 36 BRBS at 89-90 (CRT). After considering the evidence, the Court finds that Mr. Williams has established his entitlement to total disability benefits during his enrollment at Bishop State. First, Mr. Williams' course work at Bishop State precluded him from maintaining any employment. Mr. Williams was required by the VA to attend school full-time and to maintain a 2.5 grade point average. TR. 34, 73. Mr. Williams testified that he had difficulty with the work at Bishop State, often staying up late into the night to complete his homework. TR. 34, 79, 104. Mr. Williams received a job offer for a guard position with Nyco Security, but Mr. Williams declined the offer because of his school schedule. TR. 40, 79. Mr. Williams explained that he was not able to both work

and go to school. TR. 78-79, 83, 104. In fact, even without the burden of a job, Mr. Williams had to drop classes during some terms because of the difficulty. TR. 73-75. The Court finds Mr. Williams' testimony credible, and given Mr. Williams' time constraints while at Bishop State, the Court finds that Mr. Williams was precluded from employment due to his vocational rehabilitation program.

The Court also finds that Mr. Williams was diligent in completing his degree at Bishop State. Mr. Williams testified that, in order to complete his degree expeditiously, he went to school during the summer and took on heavy class loads during some terms. TR. 104-05. Mr. Williams testified that his mind set at Bishop State was to quickly complete the program so he could become employed and move on with his life. TR. 105. The Court finds that Mr. Williams proceeded industriously at Bishop State and that his efforts in the program were productive. Mr. Williams was required by the VA to maintain a grade point average of 2.5, and Mr. Williams graduated with a grade point average of 2.892, despite his difficulty with adjusting to college life. TR. 34, 73.

Although Ingalls did not agree to Mr. Williams' participation in a rehabilitation program, the Court finds that Mr. Williams' enrollment at Bishop State was consistent with the LHWCA's goal of promoting the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force. See Abbott, 40 F.3d at 127, 29 BRBS at 26 (CRT). Mr. Williams' rehabilitation training was endorsed by the VA, Dr. Peterson, and the DOL. TR. 28-31, 35; CX-2; RX-21, p. 28; RX-28, pp. 49-50. Dr. Setzler also indicated in May 1999 that Mr. Williams should seek employment in a field that did not involve heavy labor. RX-20, p. 33. In short, the Court finds that although Ingalls did not approve Mr. Williams' enrollment at Bishop State, Mr. Williams' enrollment at Bishop State was reasonable within the parameters of the Abbott rule.

Likewise, although Mr. Williams has not in fact experienced a monetary benefit from his degree from Bishop State, evidence of an eventual increase in wage-earning capacity is not mandatory for an award under the Abbott rule. Castro, 37 BRBS at 68, 72; Brickhouse, 315 F.3d at 295-296, 36 BRBS at 91 (CRT). The Court finds that, despite the current lull in the economy and job market, Mr. Williams' degree from Bishop State will positively affect his long-term earning potential. The hotel, guard, and sales openings identified by Mr. Sanders as suitable alternative employment for Mr. Williams ranged in pay from $5.25 to $7.00 per hour. RX-25. In contrast, based on his degree from Bishop State, Mr. Williams could expect entry level wages of approximately $8.00 to $9.00, according to Ms. Berthaume. CX-2, p. 10. Mr. Sanders likewise indicated that Mr. Williams' retraining at Bishop State should afford Mr. Williams the ability to earn wages more closely resembling his earnings at Ingalls and Alta. RX-25, p. 4. Therefore, both Mr. Williams and Ingalls should benefit in the long-term from Mr. Williams' retraining at Bishop State, and the Court finds that this potential benefit in Mr. Williams' wage-earning capacity is sufficient under the Abbott rule. See Castro, 37

BRBS at 68, 72; Brickhouse, 315 F.3d at 295-296, 36 BRBS at 91 (CRT). Based on the foregoing, the Court finds that Mr. Williams' participation in the VA's rehabilitation program at Bishop State was reasonable and that suitable alternative employment was reasonably unavailable to Mr. Williams during his enrollment at Bishop State.

The next issue is whether suitable alternative employment for Mr. Williams existed after his graduation from Bishop State. The Court finds that suitable alternative employment did exist for the time after Mr. Williams' graduation. Mr. Williams graduated on May 5, 2002. TR. 35. In a report on August 8, 2002, Mr. Sanders identified three suitable alternate positions for Mr. Williams, based on his age, education, training and experience, and physical capabilities. RX-25, pp. 5-6. Mr. Sanders identified a desk clerk position with Fairfield Inn, in which the physical requirements consisted of lifting 5 pounds occasionally, standing and walking occasionally, and sitting and handling frequently. RX-25, p. 5. Mr. Sanders next identified a desk clerk position with Courtyard Marriot, with physical requirements resembling the Fairfield Inn position. RX-25, p. 5. Mr. Williams also identified sales associates positions with Calagaz One Hour Photo, in which the physical requirements were occasional lifting of 5 pounds, occasional sitting, infrequent forward bending, and frequent standing, walking, and handling. RX-25, p. 5. In addition, in his April 22, 2003 report, Mr. Sanders identified night auditor trainee positions with Holiday Inn Express and Hampton Inn, which required occasional standing and walking, frequent sitting and handling, and negligible lifting. RX-25, pp. 7-8. In his April 2003 report, Mr. Sanders also identified telemarketing openings with West Teleservices, which consisted of sedentary work. RX-25, p. 8. Based on Ms. Berthaume's reports, an electronic technician opening with Mobile Infirmary in August 2002 was a viable opportunity for Mr. Williams. CX-2, p. 22.

Dr. Peterson assigned permanent restrictions for Mr. Williams of no lifting of greater than 30 pounds, no bending, twisting, climbing, or crawling, and five minute breaks after 30 minutes of standing and/or sitting. RX-21, p. 31-33; RX-22, p. 17-18. Based on these restrictions, the Court finds that Ingalls established the existence of suitable alternative employment beginning on August 8, 2002.[3]

If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

[3] Although Mr. Sanders had previously identified openings with similar duties and physical requirements on November 13, 2000, Mr. Williams' rehabilitation program at Bishop State made the November 2000 openings reasonably unavailable, as discussed earlier by the Court.

In this case, the Court finds that Mr. Williams has been diligent in his job search efforts since his graduation from Bishop State. Mr. Williams testified that he was eager to move on with his life and return to work after his graduation. TR. 35. Mr. Williams used vocational assistance from the VA and DOL, searched online for employment, visited prospective employers, checked leads from labor market surveys, checked newspapers and job listing services, and visited State of Alabama employment offices. TR. 35-36, 43. Mr. Williams testified that the VA assisted him in formulating his resume, preparing for interviews, and acquiring job search literature. TR. 36-37. Based on this evidence, the Court finds that Mr. Williams has demonstrated a willingness to work since his graduation.

With respect to his job search, Mr. Williams scored well on a placement exam with the Mobile County Personnel Board, but referrals from that office to openings in the Mobile Municipal Information Systems department and the City of Mobile Police Department were not fruitful. TR. 37-38, 95; CX-3, pp. 8-11, 30-32, 40-43. Mr. Williams pursued an airport security personnel position with the Transportation Security Administration, a computer repair position with Sears, bio-med equipment repair positions with Springhill Memorial Hospital and Mobile Infirmary Health System, an electronic technician position with ITC Deltacom, a communications-related position with Digidyne, Inc., and a computer repair position with the University of South Alabama. TR. 39-45; CX-3, pp. 3-7, 13-27, 50-52. Mr. Williams also contacted Providence Hospital, BellSouth, Comcast Cable Vision, Arnold's Instruments, Z Technology, Bagby & Russell Electric Company, the Army Civilian Personnel Office, USA Jobs, Alltel, Cingular Wireless, and UPS. TR. 38, 45-49; CX-3, pp. 28-29, 39, 44-49, 53-80.

Mr. Williams testified that he also applied to jobs outside of the electronic engineering field. TR. 36. Based on Mr. Sanders' leads, Mr. Williams applied to Fairfield Inn, Courtyard Marriot, Calagaz One Hour Photo, Holiday Inn Express, Hampton Inn, and West Teleservices. TR. 40-42; CX-3, pp. 33-36. Mr. Williams also re-applied at Nyco Security for the guard position he was offered in November 2000. TR. 40. Despite his efforts, Mr. Williams has not been able to secure employment. TR. 106. Mr. Williams testified that since his graduation, he has searched for jobs three times a week on average. TR. 36. Mr. Williams explained that he does not search for work every day because of continuing physical ailments. TR. 36, 85-86. After reviewing Mr. Williams' job search efforts, the Court finds that he has been diligent in seeking employment. As Mr. Williams has not been able to gain employment since his graduation, despite a diligent job search and a willingness to work, the Court finds that Mr. Williams' entitlement to total disability benefits has continued since he graduated on May 5, 2002.

The parties have stipulated that Mr. Williams was paid temporary total disability benefits for the following periods during his employment with Ingalls: April 18, 1994 to

April 20, 1994; April 22, 1994 to April 24, 1994; May 19, 1994 until July 10, 1994; and February 15, 1995 until April 5, 1995. JX-1; RX-27, pp. 27, 50-52. During his employment with Alta, Mr. Williams was paid temporary total disability benefits from November 15, 1996 to December 2, 1996 and from March 3, 1997 until April 30, 1997. TR. 28, 65-67; JX-1; CX-6. Mr. Williams was paid for the November-December 1996 and March-April 1997 periods because he was unable to work at Alta due to his back condition. RX-20, pp. 25-34.

Mr. Williams was next paid temporary total benefits from October 6, 1999 to November 11, 2000, and Mr. Williams has received permanent partial benefits since November 11, 2000. JX-1; CX-6. These payments are made by Ingalls based on a severe recurrence of Mr. Williams' back problems, which ultimately led to further surgery. RX-20, p. 35; RX-21. Based on the findings of the Court regarding suitable alternative employment and Mr. Williams' participation in a rehabilitation program, Ingalls' payments since October 6, 1999, have been incorrect. First, rather than October 6, 1999, when Mr. Williams suffered physical problems, Mr. Williams' temporary total disability payments should have begun on August 21, 1999, when he originally became enrolled at Bishop State. TR. 31. Although Mr. Williams withdrew from Bishop State in October or November 1999, Mr. Williams continued to be entitled to temporary total disability benefits, without interruption, until September 11, 2000, due to the state of his back condition beginning in October 1999 and his re-enrollment at Bishop State in August 2000. Mr. Williams thereafter reached maximum medical improvement on September 12, 2000, at which time he became entitled to permanent total disability benefits. Mr. Williams has been entitled to permanent total disability benefits since September 12, 2000, based on his participation in the work rehabilitation program at Bishop State and the unavailability of employment for him since his graduation in May 2002.

Mr. Williams was not paid for the November-December 1996 and March-April 1997 periods until April 14, 2000. CX-6. Likewise, Mr. Williams' benefits from October 6, 1999 until April 14, 2000, were not paid until April 14, 2000. CX-6. Therefore, Mr. Williams is entitled to interest for Ingalls' delay in payments for these periods, in addition to his entitlement to interest on benefits that have been altogether unpaid. See Quave v. Progress Marine, 912 F.2d 798, 801, 24 BRBS 43, 45 (CRT) (5th Cir. 1990); Foundation Constructors v. Director, OWCP, 950 F.2d 621, 625, 25 BRBS 71, 76-77 (CRT) (9th Cir. 1991).

In addition, § 10(f) of the Act provides that a claimant's compensation shall be adjusted annually to reflect the rise in the national average weekly wage in all cases of injury that result in permanent total disability or death. See 33 U.S.C. § 910(f). Accordingly, upon reaching a state of permanent and total disability on September 12, 2000, Mr. Williams is entitled to annual cost of living increases pursuant to § 10(f) of the Act.

AVERAGE WEEKLY WAGE

The parties in this case have stipulated that Mr. Williams' average weekly wage at the time of his injury was $524.68. JX-1. This stipulation is supported by the record and is accepted by the Court. RX-5.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; See also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); See McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); See Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. See Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g, 6 BRBS 550 (1977).

Because Mr. Williams has established that he suffers from an employment-related condition in his back, Mr. Williams is entitled to benefits for all past and future compensable medical expenses arising from that condition.

SECTION 8(F) SPECIAL FUND RELIEF

Section 8(f) shifts part of the liability to pay compensation for permanent disability or death from an employer to the Special Fund established in ' 44 of the Act when the disability or death is not due solely to the injury that is the subject of the claim. See Wiggins v. Newport News Shipbuilding & Dry Dock Co., 31 BRBS 142, 146 (1997); 33 U.S.C. ' 908 (f) and ' 944. To be entitled to compensation under ' 8(f) when the employee is permanently totally disabled, the employer must establish that the employee seeking compensation had: (1) an Aexisting permanent partial disability@ before the employment injury; (2) that the permanent partial disability was Amanifest@ to the employer; and (3) that the current disability is not due solely to the employment injury. Two AR@ Drilling Co. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34, 35 (CRT) (5th Cir. 1990); Director, OWCP v. Campbell Industries Inc., 14 BRBS 974, 976 (9th Cir. 1982), cert. denied, 459 U.S. 1104, 113 S.Ct. 726, 74 L.Ed. 2d 951 (1983); 33 U.S.C. ' 908(f)(1).

With respect to the requirement of an existing permanent partial disability, the term "disability" in ' 8(f) can be an economic disability under ' 8(c)(21) or one of the scheduled losses specified in " 8(c)(1) (20), but it is not limited to those cases alone. C & P Tel. Co. v. Director, OWCP, 564 F.2d 503, 513 (D.C. Cir. 1977) "Disability" under ' 8(f) is necessarily of sufficient breadth to encompass those cases wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of an employment related accident and compensation liability. Id.

The evidence in this case establishes that Mr. Williams had an existing permanent partial disability to his back prior to his April 15, 1994 work-injury at Ingalls. In 1980, Mr. Williams suffered an injury to his back due to a car accident. TR. 15, 53-54; RX-18. As a result, Mr. Williams suffered periodic back spasms and received intermittent medical treatment for his back up until his employment with Ingalls and his work injury in 1994. TR. 16, 56-59; RX-18. Upon his retirement from the Army in 1992, Mr. Williams was assigned a 10% disability rating for his back. TR. 30, 60. Based on the foregoing, the Court finds that a cautious employer would determine that Mr. Williams' pre-existing back disability greatly increased the employer's risk of an employment-related accident and compensation liability. Therefore, the Court finds that Mr. Williams' pre-existing disability in his back is sufficient to satisfy the first requirement under ' 8(f).

With respect to the requirement of manifest knowledge by the employer, it is well established that a pre-existing disability will meet the manifest requirement of ' 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable. Wiggins v. Newport Shipbuilding &

Dry Dock Co., 31 BRBS 142, 147 (1997); Esposito v. Bay Container Repair Co., 30 BRBS 67, 68 (1996). The medical records pre-existing the subsequent injury need not indicate the severity or precise nature of the pre-existing condition in order for the manifest requirement to be satisfied; rather, medical records will satisfy this requirement as long as they contain sufficient, unambiguous and obvious information regarding the existence of a serious lasting physical problem. Wiggins, 31 BRBS at 147; Espositio, 30 BRBS at 69. In addition, the pre-existing disability need not be manifest at the time of hiring, but only at the time of the compensable subsequent injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616, 619, 16 BRBS 137, 139 (CRT)(9th Cir. 1983)(en banc).

In this case, United States Army medical records document the existence of Mr. Williams' back problems prior to his April 15, 1994 work-accident. RX-18. The Court finds that the existence of Mr. Williams' pre-existing back condition was objectively determinable based on these records. Because medical evidence prior to April 15, 1994, is available from which the second requirement under ' 8(f) is satisfied, the Court finds that Mr. Williams' pre-existing back condition was manifest to Ingalls before Mr. Williams' April 15, 1994 work-accident.

The third element under ' 8(f) requires Ingalls to establish that Mr. Williams' current disability is not due solely to his April 15, 1994 employment injury. This requirement is also met. After reviewing Mr. Williams' medical records from the Army and Dr. Setzler, Dr. Peterson opined that Mr. Williams' pre-existing back problem combined with and contributed to the effects of his April 1994 work injury at Ingalls to make Mr. Williams materially and substantially more disabled than he would have been if he did not have the pre-existing conditions. RX-22, p. 22-24. Therefore, the Court finds that Mr. Williams' pre-existing conditions contributed at least in part to his current disability, thereby fulfilling the third requirement under ' 8(f). Given the above analysis, the Court finds that Ingalls has met all the requirements under ' 8(f) and is entitled to relief under that section.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that**:**

1) Employer shall pay to Claimant compensation for temporary total disability benefits from April 18, 1994 to April 20, 1994; April 22, 1994 to April 24, 1994; May 19, 1994 until July 10, 1994; February 15, 1995 until April 5, 1995; November 15, 1996 until December 2, 1996; March 3, 1997 until April 30, 1997; and August 21, 1999 until September 11, 2000, based on an average weekly wage of $524.68.

2) Employer shall pay to Claimant compensation for permanent total disability benefits, based on an average weekly wage of $524.68, commencing September 12, 2000, and continuing for a period of 104 weeks, after which time such permanent total disability benefits shall be paid from the Special Fund pursuant to Section 8(f) of the Act. In addition, such compensation shall be adjusted annually for cost of living increases pursuant to Section 10(f) of the Act.

3) Employer shall pay to Claimant interest on any unpaid compensation benefits. Employer shall also pay interest on benefits that were paid late during the periods of November 15, 1996 to December 2, 1996; March 3, 1997 to April 30, 1997; and October 6, 1999 to April 14, 2000. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

4) Employer shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses, with interest in accordance with Section 1961, which are the result of Claimant's work-related back condition.

5) Employer shall be entitled to a credit for all payments of compensation previously made to Claimant.

6) Claimant's counsel shall have thirty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge